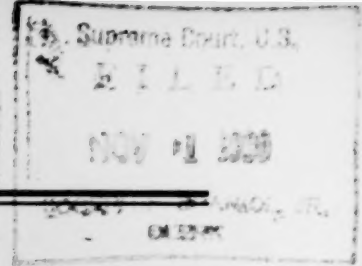


(2)
No. 90-562



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

MONICA GETZ,

Petitioner,

vs.

STANLEY GETZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

**BRIEF OF RESPONDENT, STANLEY GETZ,
IN OPPOSITION**

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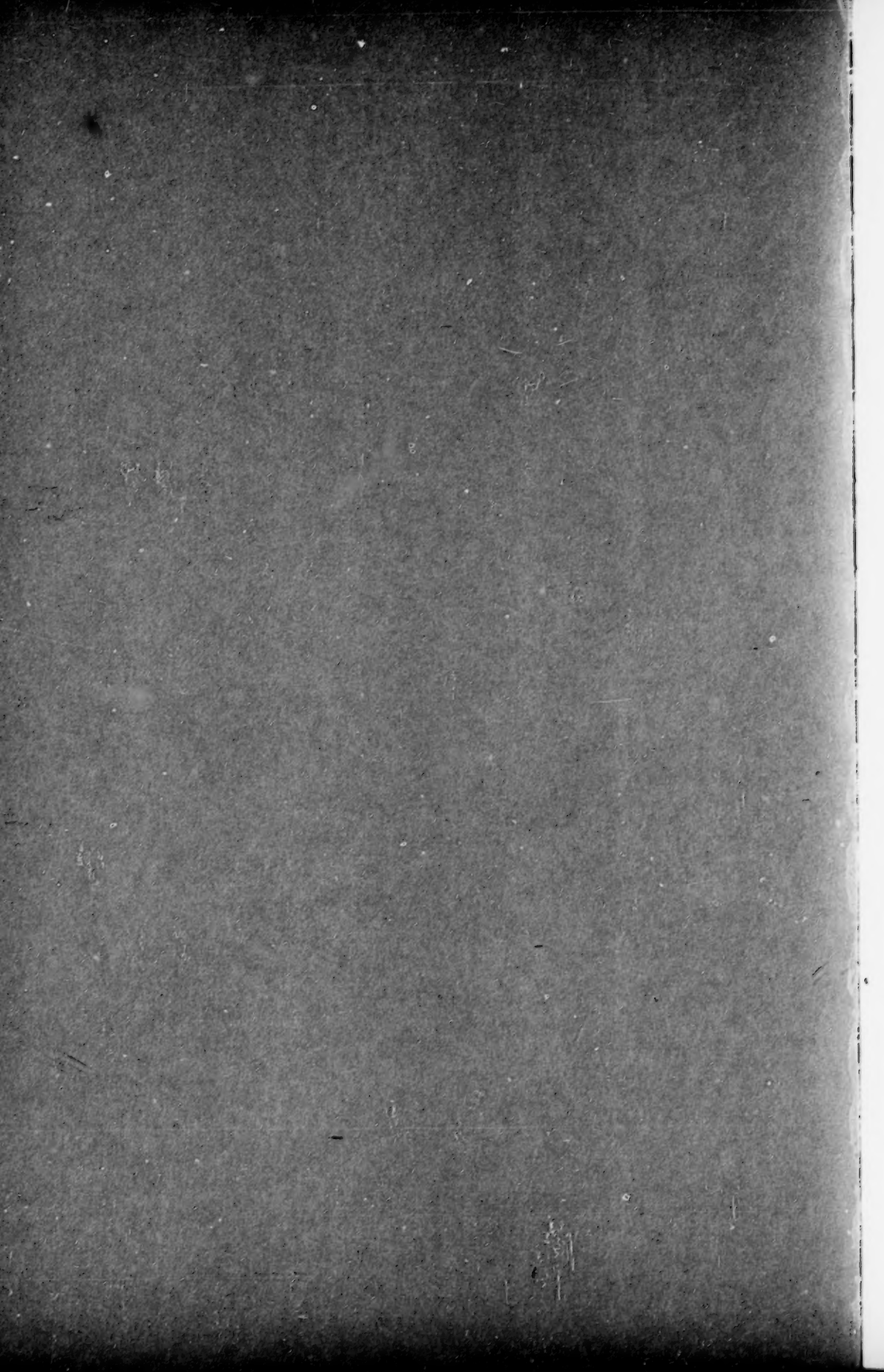


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Respondent, Stanley Getz, respectfully asks that the petition for a writ of certiorari sought by Monica Getz to review the order of the Court of Appeals of the State of New York entered on July 2, 1990, be denied. Said order denied her motion for leave to appeal the order of the Appellate Division entered December 7, 1989 dismissing her appeal, as limited by her brief, to that portion of the judgment which dismissed her defense of recrimination which cannot be used as a defense to a cause of action for divorce based on cruelty. Monica Getz's motion to reargue the motion to dismiss her appeal, or, in the alternative, for leave to appeal to the Court of Appeals of the State of New York, was likewise denied by the Appellate Division.¹

¹ See Appendix A, Appendix B and Appendix C to the Petition herein.

COUNTERSTATEMENT OF THE CASE AND FACTS

Petitioner's blatant misstatements of the case and the facts make this counterstatement necessary pursuant to Rule 15 of the Rules of this Court.

It should be noted at the outset that there is *presently pending* in the Appellate Division of the Supreme Court of the State of New York, Second Department, Monica Getz's appeal from that portion of the order of Hon. Nicholas Colabella, filed and entered in the office of the County Clerk of Westchester County on January 12, 1990, which denied her cross-motion to set aside the jury verdict and the judgment of divorce and for a new trial on the issue of fault, and to vacate or modify the equitable distribution judgment entered on March 10, 1989. That appeal has been perfected and all briefs have been filed; it merely awaits the scheduling of a date for argument before the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. Petitioner herein makes no mention of this pending appeal. It is indeed obvious, therefore, that this petition for a writ of certiorari to the Court of Appeals of the State of New York should be summarily denied since the July 2, 1990 order of that Court does not constitute a final determination of this case.

The order of the New York Court of Appeals denying petitioner's motion for leave to appeal the dismissal by the Appellate Division of her appeal from the judgment entered in Westchester County on March 10, 1989 was proper. There was no denial of her rights and no violation of the due process and equal guarantees of the Fourteenth Amendment; and, certainly, her petition raises no real issue as to the "gender bias" of any New York statute.

The action for divorce, commenced in 1981, was brought upon two grounds, adultery and cruel and inhuman treatment. These fault issues were tried before a jury which separately and unanimously found in favor of the plaintiff, Stanley Getz (Respondent herein) on both adultery and cruelty grounds after a thirteen (13) day trial. It is significant to note that, despite

the fact that the jury found against defendant, Monica Getz, (petitioner herein) on both adultery and cruelty grounds, the Judgment of Divorce was made and entered *only* upon the ground of cruelty (App. 1).

The judgment of divorce was dated October 6, 1987 and entered on October 7, 1987, more than three years ago. Monica Getz filed a notice of appeal from that judgment but did not timely perfect the appeal. She was granted a substantial extension of time by the Appellate Division to perfect her appeal with the admonition that "no further extension of time would be granted". (App.2) Despite such admonition she still did not perfect her appeal within the *extended* time and moved for an enlargement of time to settle the record on appeal from the judgment of divorce. This motion was *denied* by decision and order of the Appellate Division dated May 11, 1989, and on the Court's own motion the appeal from the judgment of divorce was dismissed. The Appellate Division noted as follows:

"The appellant sought and received an extension of time to perfect this appeal. The appellant was on notice that 'no further extension of time would be granted' " (App. 3)

Monica Getz then moved for reargument of her motion to enlarge her time to perfect her appeal from the judgment of divorce. Reargument was denied by decision and order of the Appellate Division dated September 5, 1989 (App. 4)

The petitioner (defendant below) moved in the trial court to set aside the jury verdict which had found that she had committed acts constituting cruel and inhuman treatment *and* adultery. That motion was denied by order of Justice Colabella entered on January 17, 1989. Petitioner filed notice of appeal from that order to the Appellate Division. Respondent, Stanley Getz, moved, in the Appellate Division to dismiss that appeal from the order denying Monica Getz's motion to set aside the jury verdict. By decision and order of the Appellate Division, dated October 5, 1989, the motion to dismiss the appeal was granted and the appeal was dismissed (App. 5)

It should here be noted that the appeal which the New York Court of Appeals refused to review was from the order of the Appellate Division entered on December 7, 1989 which dismissed petitioner's appeal, as limited by her brief, from that portion of the judgment of Justice Colabella, entered on March 10, 1989, which dismissed petitioner's defense of recrimination.

Since the judgment of divorce in this case was entered only upon the ground of cruelty, and since recrimination is a defense only to a judgment upon the ground of adultery, petitioner's appeal below (limited by her brief to that portion of the judgment which dismissed her defense of recrimination) was properly dismissed by decision and order of the Appellate Division dated December 7, 1989 upon the ground that "recrimination . . . cannot be used as a defense to a cause of action based on cruelty" (See Petitioner's Appendix B).

Since the Appellate Division below dismissed Monica Getz's appeal from the Judgment of Divorce by its decision and order of May 11, 1989 (App. 3); and since that Court denied Monica Getz's motion for reargument by its decision and order of September 5, 1989, (App. 4); and since, by its decision and order of October 5, 1989, (App. 5), that Court dismissed Monica Getz's appeal from the order of Justice Colabella which denied her motion to set aside the jury verdict and for a new trial; it would have been bootless and inappropriate to permit Monica Getz's limited appeal from the judgment of Justice Colabella, entered on March 10, 1989, which dismissed her defense of recrimination.

The petitioner's recital of "The Facts" is woefully distorted and untruthful in an obvious attempt to create the utterly false impression that she is "near destitution"; that her life "has been left in shambles"; and that she has been denied rights "in violation of the due process and equal protection guarantees of the Fourteenth Amendment"; and that New York's divorce statute is gender biased.

The equitable distribution decision of Justice Colabella and the judgment entered thereon, on March 10, 1989 (App. 6)

awarded to Monica Getz an equal (50 %) distribution of marital property.² Included in that award to Monica Getz is 1/2 the net proceeds of the sale of the Shadowbrook estate (the former marital home) where petitioner still resides alone. Shadowbrook consists of a 28 room main house (with a living area of 11,155 feet) and 2 guest houses situated on more than 9 acres in Irvington, New York. In September 1988, Justice Colabella directed the sale of Shadowbrook. Monica Getz's motion to stay the sale was denied by the Appellate Division. Solely because of Monica Getz's refusal to cooperate in such sale, Justice Colabella appointed an appraiser to evaluate the property. It was valued by the court appointed appraiser at \$2,250,000. A potential buyer was found at an all cash (subject to mortgage) selling price of \$2,400,000, \$150,000 more than the court appraiser's evaluation. Stanley Getz and the purchaser signed the contract of sale. Monica Getz refused to sign the contract. Stanley Getz, because of Monica's unjustifiable refusal to sign the contract, made application to the Court to direct the Sheriff of Westchester County to sign the contract and deed on behalf of Monica. That application was granted and the contract was signed by the Sheriff on Monica's behalf.

Unfortunately, the sale of Shadowbrook fell through because of the purchaser's inability to secure the required mortgage. As a result, Monica Getz still resides at Shadowbrook and, contrary to her false claim of poverty, she is receiving more than \$75,000 per year in rentals from that property pursuant to the judgment of Justice Colabella, entered on March 10, 1989, which, in pertinent part, awards to her the rents from Shadowbrook "pending the sale of the Shadowbrook property".

Furthermore, that judgment of March 10, 1989, provides for an equal division between the parties of all royalties for recordings made by Stanley Getz from the date of the marriage in November 1956 to the commencement of the divorce action in

² It is significant to note that from the very commencement of this action, Stanley Getz consented to a 50 % division of all marital assets. Monica Getz, however, demanded even a greater distribution.

February 1981. As a result, Monica Getz has received from Polygram Records her 50 % share of Stanley Getz's royalties totalling, in 1987 and 1988, more than \$112,000 or an average yearly income to Monica Getz of \$56,000. It is estimated that she received the same or similar income from royalties in 1989 and, to date, in 1990. Bearing in mind that her royalty income is not taxable, as part of an award of equitable distribution, it is indeed obvious that her claim of being "near-destitution" should fall on deaf ears. Her yearly income from Shadowbrook rents and record royalties totals at least \$133,000.

In addition the equitable distribution judgment of March 10, 1989, directs the sale of 5000 square meters of jointly owned real property in Spain. That property was purchased in 1970 for \$30,000. The judgment directs an *equal* division of the net proceeds of said sale. As yet, that property has not been sold.

Nowhere in her recital of facts does the petitioner mention the fact that Stanley Getz is terminally ill from liver cancer, lymphoma and cirrhosis of the liver. This finding was made by Justice Colabella in his decision of February 10, 1989 culminating in the judgment of March 10, 1989, based upon the medical records and testimony adduced and the Mayo Clinic reports. The petitioner, upon application to the Court, was given permission to conduct a physical examination of Stanley Getz by a physician of her choice. Such examination was conducted by the physician selected by petitioner, Dr. Peter David Boasberg in Santa Monica, California. Dr. Boasberg confirmed the diagnosis of Dr. Avram Cooperman (who testified at the trial) and of the Mayo Clinic that Stanley Getz is terminally suffering from proven liver cell cancer and lymphoma. Dr. Boasberg stated at the conclusion of his report of March 13, 1990, that respondent's "time is extremely limited and could be measured in a matter of a few months".

Furthermore, nowhere in petitioner's recital of facts does she allude to the finding, after trial, by Justice Colabella that, in contrast, she is in apparent good health and that, unlike respondent's situation, there is no impairment to her ability to work

and to supplement the equitable distribution award. Petitioner is college educated, multilingual and, as found by Justice Colabella, experienced in the production end of the entertainment industry and that her many diverse talents are shown by her "volunteer work in founding the Swedish Council on Alcoholism and Addiction, her current initiative to develop a substance abuse program in the Soviet Union, her appointment as Chairman of the Board for the National Council on Alcoholism and her service on the Board of Directors of Odyssey House." She was further found to be "an extremely determined and resourceful individual." With respect to petitioner's earning ability, Justice Colabella succinctly stated:

"If defendant has suffered a diminishment in earning ability, due to a lack of recent remunerative employment, it is the product of her own choosing. She has had ample opportunity since 1981 to either reenter the work force or obtain additional education to prepare for her return to work".

To dispel the false impression created by petitioner that this litigation, commenced in 1981 was, in any way delayed because of any actions or tactics by Stanley Getz, we are impelled to relate the procedural history of this case up to the ultimate determination by Justice Colabella. There can be no question that it was the petitioner, Monica Getz, who made every conceivable effort to delay this case in order to avoid entry of divorce and final resolution of all financial issues.

This action for divorce in the Supreme Court of the State of New York was commenced in February, 1981. Stanley Getz's complaint was dated August 10, 1982. An answer was interposed on August 18, 1982. Separate support proceedings were conducted in the Family Court in 1982. The parties entered into an "Agreement Toward Reconciliation" on February 11, 1982. Extensive depositions and pre-trial discovery took place in both the Family Court and the Supreme Court actions.³ After

³ Only the Supreme Court of the State of New York has jurisdiction over divorce actions.

extensive additional Family Court proceedings in 1986, the Family Court proceeding was consolidated into the Supreme Court action by Justice S. Barrett Hickman. The case had been placed on the calendar in January 1985 then stricken and thereafter placed on the calendar for trial in 1986.

The sole and only factor which turned this case into the lengthy, expensive and bitterly contested proceeding it has become was Monica Getz's single minded determination to keep control over the only significant marital asset, a home known as Shadowbrook, and to deny Stanley Getz a divorce. The resulting cost in time, energy and money has been astronomical. It is for that reason that approximately seven Judges in two Courts (exclusive of the Appellate Division and the Court of Appeals) have thus far been involved in this case, not to mention seven lawyers on Monica Getz's side alone.

On June 4, 1986, twelve days before the scheduled trial (then before Hon. Vincent Gurahian) after considerable wrangling, hundreds of pages of depositions, numerous pre-trial conferences and proceedings, Monica Getz discharged her long-time attorney, James Dempsey. As a result, she obtained a ten week adjournment from the Court in order to find new counsel. She retained one Abraham Reingold.

Prior to June 1986, Stanley Getz's counsel had made numerous efforts to settle the case, each of which were completely rebuffed by Monica. On one occasion in the Spring of 1986, Stanley Getz flew in from California for the sole purpose of attending a settlement conference at Supreme Court, Westchester County, but Monica refused to even discuss any settlement at that time.

Monica Getz's tactics reached their first crescendo in September, 1986, when Justice Gurahian declared a mistrial after eight days of jury trial.

Justice Gurahian commented:

The Court: Mr. Reingold, you have been trying and trying, for some reason, to get a mistrial. You have

tried to avoid the beginning of this trial. You have attempted in every way possible to avoid starting this trial . . .”

and, when he declared a mistrial, Justice Gurahian went on to state:

The Court: Mr. Reingold, you have succeeded, and I wish you joy in your success. I think you made a great mistake, I really do, but that's your privilege. I'm happy to be rid of this case *because for six months there have been attempts and maneuvers to avoid a trial of this case.* (emphasis added)

Monica's new counsel, Abraham Reingold, undoubtedly at her behest, embarked on a course of conduct which included innumerable attempts to delay, postpone, and avoid the next trial including multiple motions and a stay application to the Appellate Division, all of which succeeded in wasting a great deal of time and effort and cost a great deal in counsel fees.

Both before and after the declaration of a mistrial before Justice Gurahian, Monica's then attorney made at least four separate motions to stay the trial claiming that Mr. Getz was in arrears in paying support and therefore should not be permitted to proceed with his case. Monica's August 18, 1986 request for this relief was denied by Justice Gurahian on September 4, 1986. A second motion by Monica was denied by Justice Gurahian on September 9, 1986. After the mistrial was declared and Justice Gurahian recused himself, Justice Barrett Hickman was assigned to the case by then Administrative Justice Joseph Gagliardi, whereupon another deluge of delaying applications followed. A third motion to stay the trial by Monica was denied by Justice Hickman's Decision and Order dated October 2, 1986. A fourth motion by her was denied by Justice Hickman's Decision and Order dated February 3, 1987. At that point, Monica had made seven (7) procedural motions.

In a decision dated October 2, 1986 Justice Hickman noted:

"Plaintiff's action for divorce, commenced in August 1981, is now almost six years old. It has been beset by numerous delays which, on the state of this record, should not be allowed to continue."

On November 13, 1988 Justice Hickman wrote:

"The Court will tolerate no further unnecessary delay."

On December 1, 1986 Justice Hickman wrote:

"It bears repeating that this case requires a firm and expeditious disposition which I fully expect to facilitate."

On February 3, 1987, Justice Hickman noted:

"After six years it is time to dispose of this case without further nonsense. It is my intention to file the original of this letter as Court's Exhibit No. "1" at the commencement of the trial, as a record of my directions and instructions to both parties and as a clear indication of the court's feelings on this matter."⁴

In his February 3, 1988 order, Justice Hickman stated:

"The defendant is advised that any further efforts to circumvent the Court's ruling will be dealt with summarily.

The attorneys should be advised that many of the issues which have been raised in these and previous motions have been redundant and unwarranted."

Although these motions, having been denied, were legally unsuccessful, they did manage to cause delay

⁴ It is to be noted that every application to delay the trial was made by Monica Getz.

to the extent that time, effort and money were spent wading through Monica's frivolous and redundant claims. Moreover, until the motions were decided, it was impossible to proceed with the trial. Indeed, her lawyer kept the Court so busy with redundant applications that the trial could not go forward.

The application to stay the trial was also pursued in the Appellate Division, Second Department, despite the application having been denied on at least four previous occasions by two separate Justices of the Supreme Court. Again, time, effort and money were wasted on a frivolous and voluminous stay application on a matter which already had been argued at length and decided repeatedly against Monica. In the Appellate Division, however, she also sought to recuse the trial judge (S. Barrett Hickman) based on allegations of bias. The bootstrapping reasoning to which she subscribed was that, *inter alia*, since the Court refused to grant the stay, and since the Court was becoming increasingly incensed with the unnecessary, redundant, costly and time consuming motions which were being filed, that therefor the Court was prejudiced against her. Her application was rejected by the Appellate Division.

Following approximately seven months of legal maneuvering by Monica Getz before Justice Hickman, as a result of factors out of his control (including the death of his wife), Justice Hickman was unable to proceed with the case. Justice Gagliardi (then the Administrative Justice of the Supreme Court, Westchester County) thereupon appointed Hon. Nicholas Colabella to act as the presiding Justice for all purposes to oversee the completion of what Justice Gagliardi termed "the worse case he had ever seen".

On July 8, 1988, shortly after the return of the jury verdict (which found Monica guilty of adultery and cruelty) she replaced Mr. Reingold with Sanford Dranoff, Esq. She again attempted to delay the action by attempting to recuse Justice Colabella from presiding over the remaining financial issues of the case upon the ground that Monica's former counsel, Abraham Reingold, campaigned for the same judicial seat, as did Justice

Colabella. The recusal motion was denied but again, ate up a good part of a day that had been set aside for trial.

The unavailability of Mr. Dranoff also resulted in this case being delayed. Despite being brought into the case in July 1988, on numerous occasions, his schedule prevented him from agreeing to dates for the resumption of trial.

Mr. Getz underwent surgery for the removal of a cancerous tumor in September 1987. After considerable discussion and argument, both oral and written, on October 6, 1987 Justice Colabella signed the judgment of divorce in favor of Mr. Getz.

The equitable distribution portion of the trial proceeded in October and December 1987 and was thereafter adjourned. Numerous additional efforts were made to delay the proceedings.⁵

On May 6, 1988 Justice Colabella scheduled the recommencement of the trial to take place on June 6, 1988. The Court's order stated that "no requests for adjournment will be considered". Notwithstanding that order, on June 2, 1988, just days before trial, a new application to delay the trial was presented on the basis of a claimed heart condition of Monica for which no evidence was ever presented. The application was denied. That attempt having failed, she sought a delay on the newest excuse that she was depressed and suicidal. That excuse had never been uttered until then and, in light of the moving papers presented, the Court took testimony on the issue on June 8, 1988 (testimony from Marvin Zolt, Stanley Getz's accountant, was taken on June 6 and 7, 1988). At that time Dr. Judianne Densen-Gerber, Monica's close friend and the physician who admitted her to a hospital for treatment on the very day the trial was to resume, testified. At the hearing, Dr. Densen Gerber admitted that Monica Getz was very strong minded and willful and wished to manipulate the Court. Indeed, marked into evidence were Monica's hand written instructions as to what she wished Dr.

⁵ Only one of the many adjournments was necessitated by Stanley Getz due to the brief unavailability of his accountant.

Densen-Gerber to testify to. The Court in its decision and order dated June 17, 1988 directed a mental examination of Monica which cost Stanley Getz approximately \$3,400 for a psychiatrist and psychodiagnostician) exclusive of the cost of legal fees, and put off the resumption of trial until July 18, 1988.

The court-ordered examination of Monica produced no evidence of psychological impairment. Dr. Bloomingdale's report found:

Cognitively there is absolutely no reason why she could not appear in court and confer with and cooperate with her lawyer. Her memory, concentration, train of thought, thought control, reality testing, judgment and capacity to abstract are excellent. Her emotional adjustment, shows a probable chronic state of frustration, disenchantment, some stress but there are no indications that she will be overwhelmed by this or that she cannot cope with it. One cannot blackmail others into delaying action by threats of what one will do. This is a childish, hysterical position of role-playing and is very manipulative and controlling.

After her examination, Monica, having successfully delayed resumption of this eight-year-old case for another seven weeks, and apparently no longer suicidal nor in need of heart catheterization, flew off to Sweden for a visit with her mother and, as it turned out, with Sune Byren, with whom the jury found she committed adultery.

With the financial trial scheduled to resume on July 18, 1988 and being unable to produce any objective medical evidence of her alleged condition, Monica resorted to a previously successful delay tactic by again discharging her attorney on the eve of trial and seeking another adjournment. New counsel, Herman Tarnow, defendant's sixth lawyer (including a Mr. Minton from Chicago, but excluding the numerous lawyers she consulted), first appeared on July 18 at which time the case was

rescheduled for July 25, 1988. After lengthy argument, the matter was set down for the continuation of trial on July 25, 1988 and to continue for the week of August 8, 1988.

On August 8, 1988 the trial proceeded with Mrs. Getz in apparently robust health, both emotionally and physically (on one occasion she literally "ran" out of the courtroom). Moreover, she demonstrated tremendous physical resources during every trial day by working continuously with her new counsel to present her case both prior to the trial and during the trial. All traces of the cardiac and suicidal conditions she once sought to impress upon the Court seemed to vanish.

All of these instances of obstructionism and delay on the part of Monica Getz have had an exceedingly severe and prejudicial effect on Stanley Getz. There has been a tremendous waste of time and money caused by her machinations. Stanley Getz has incurred huge legal fees. He has also been compelled to pay doctor's fees; to pay for court transcripts, etc. etc., not to mention travel expenses and hotel bills virtually all of which could have been avoided.

Considering all the above, can it be said with any degree of logic, that Monica Getz was deprived of due process of law or that she was denied equal protection of the laws? We think not!!!

With complete justification Justice Colabella stated in his decision of February 10, 1989, as follows:

"... defendant has engaged in dilatory tactics in the course of this litigation that have obstructed and unnecessarily delayed the resolution of this action."

REASONS WHY THE WRIT SHOULD BE DENIED

- I. The adoption in 1980 of New York's Equitable Distribution Law^{*} removed any distinction based solely upon gender.

The immediate impetus for enactment of the Equitable Distribution Law in New York (Section 236 of the Domestic Relations Law) was the 1979 decision by this Court in *Orr v. Orr*, 440 U.S. 268, 59 L.Ed 2d 306, 99 S. Ct 1102 which required that alimony or maintenance statutes be gender neutral. New York's Equitable Distribution Law accordingly removed the sexual discrimination that was express or implied in New York's statutes relating to alimony and support.

The Equitable Distribution Law requires that property be distributed "equitably" after considering certain, statutory factors and upon the circumstances of the case and of the parties. It is mandatory that in any decision made concerning disposition of property, the court "shall" set forth the factors it considered and the reasons for its decision. Justice Colabella, in this case, clearly set forth the required factors considered by him and, in his judgment of March 10, 1989, awarded Monica Getz an equal fifty percent 50% of all marital property. (App. 6)

As was stated in Foster, Freed and Brandes, Law and the Family, Second Edition, Equitable Distribution at p. 331:

"We also believe that on the whole, the New York courts have done a commendable job of construing the Equitable Distribution Law, although we disagree with a few decisions. Our reading of the post 1980 decisions shows that the New York courts, with few exceptions, have fathered the spirit as well as the letter of the Equitable Distribution Law and that the law is working as intended".

^{*} Chapter 281 of the Laws of 1980, eff. July 19, 1980.

It is clear that petitioner's attack upon the constitutionality, of New York's Equitable Distribution Law (Section 236 of the Domestic Relations Law) should fall on deaf ears.

II. Petitioner was not denied Equal Protection or Due Process of Law under the Fourteenth Amendment.

We quarrel not with petitioner's argument that a refusal to afford each appellant an appeal on the same terms as other litigants violates the equal protection clause of the United States Constitution.

In this case, however as we pointed out in our Counterstatement of Facts, the petitioner's appeal from the judgment of divorce entered only on the ground of *cruelty* (based upon the jury verdict which found her guilty of both adultery and cruelty) was dismissed in the Appellate Division because she failed to timely perfect her appeal even *after* having received a substantial extension of time to do so (App. 2). Her motion for reargument was likewise denied (App 3).

The dismissal of her appeal, therefore, was not a denial of due process or equal protection under the Fourteenth amendment. She was *not* denied her right to appeal. She herself abused that right by not properly perfecting her appeal.

Petitioner's reliance upon *Lindsay v. Normet*, 405 U.S. 56, is unfounded since that case involved the inability of an indigent who could not post the penalty bond required to appeal from an adverse judgment. No claim of "indigency" was ever made by petitioner nor could she possibly have made such a valid claim. (See also: *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585 cited by petitioner), which involved an indigent criminal who was denied an appeal; and *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780).

- III. Petitioner's appeal from the March 10, 1989 "equitable distribution" judgment was properly dismissed since it was limited only to the defense of recrimination which cannot be used as a defense to a cause of action based on cruelty (See petitioner's App B).

Section 171 of New York's Domestic Relations Law, provides that a plaintiff is not entitled to a divorce although the adultery is established:

"... 4. Where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce".

This defense of recrimination does not apply to any grounds for divorce other than adultery. It has no application here where the divorce was entered only upon the ground of cruel and inhuman treatment (App. 1).

As was stated in Book I, Foster, Freed and Brandes, Law and the Family. Second Edition, 7:1, in discussing Section 171 of the Domestic Relations Law:

"The language of the unrepealed and unmodified Section 171 is such that it clearly relates only to a divorce on the ground of adultery and it would do violence to the ordinary meaning of words to hold that it applied to the new grounds for divorce."

All of the statutory defenses created by Section 171 of the Domestic Relation Law apply *only* to adultery divorces (*Woicik v. Woicik*, 66 Misc 2d 357, 321 N.Y.S. 2d 5; *Ash v. Ash*, 53 App. Div. 2d 1039, 386 N.Y.S. 2d 159; *Lowe v. Lowe*, 67 Misc 2d 271, 324 N.Y.S. 2d 229; *aff'd* 37 App. Div. 2d 525, 322 N.Y.S. 2d 975).

Monica Getz's limited appeal from the March 10, 1989 judgment was not summarily dismissed by the Appellate Division. It must be noted that the Appellate Division had before it her appellant's brief which limited her appeal to the issue of

recrimination. The fact that the Appellate Division dismissed her appeal without the benefit of a respondent's brief does not constitute a denial of her right to an appeal. The dismissal was not a *summary* dismissal. It was based on well established statutory law to the effect that recrimination cannot be used as a defense to a cause of action, as here, based upon cruelty. And that was a primary basis for Stanley Getz's motion to dismiss that appeal.

- IV. Petitioner's appeal from the order of Justice Colabella denying her cross-motion to set aside the jury verdict and the judgment of divorce and for a new trial, has been perfected and presently awaits scheduling of a date for argument before the Appellate Division Second Department. Consequently, the order of the New York Court of Appeals, dated July 2, 1990, from which certiorari is sought is not a final order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: October 31, 1990

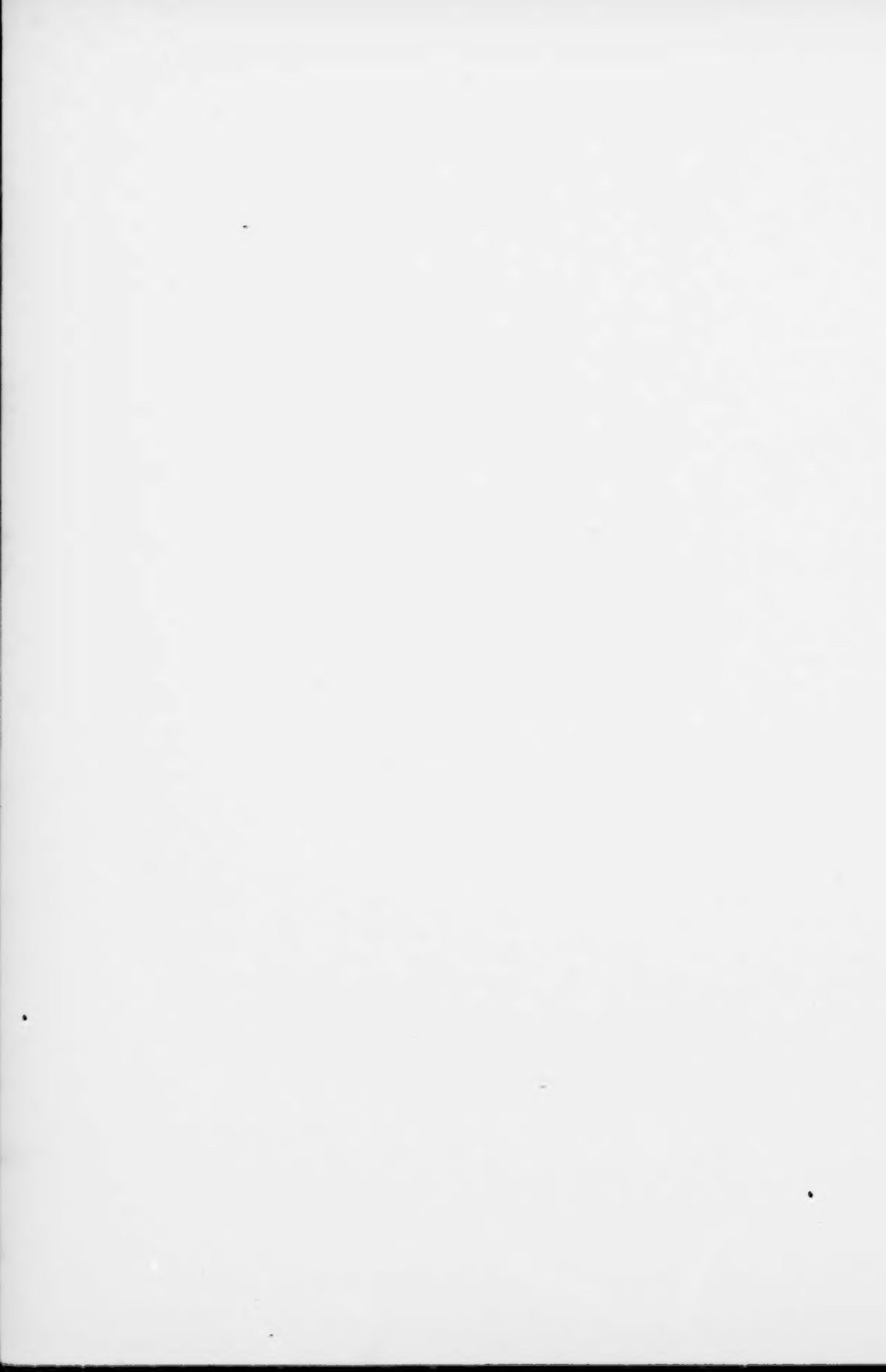
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APPENDIX



APPENDIX 1

At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Westchester, at the Courthouse, 111 Grove Street, White Plains, New York, on the 6th day of October, 1987

P R E S E N T :

Hon. Nicholas Colabella,

Justice

-----X		
STANLEY GETZ,	:	
	:	
Plaintiff,	:	JUDGMENT
	:	OF DIVORCE
— against —	:	
	:	Index No.
	:	13940/81
MONICA GETZ,	:	
	:	
Defendant.	:	
-----X		

The above entitled action having been brought by the plaintiff for judgment of divorce dissolving the marriage of the parties by reason of the cruel and inhuman treatment of the plaintiff by the defendant pursuant to Section 170(1) of the Domestic Relations Law; and the summons bearing the notation "Action for Divorce" and the verified complaint having been served within the State of New York; and the defendant having appeared and having served an answer; and the plaintiff having moved to amend his complaint and the court having granted plaintiff's motion to amend his complaint by Order dated October 21, 1986; and the defendant having filed an answer to the plaintiff's amended complaint; and the plaintiff having appeared by his attorneys, COHEN AND SHALLECK, (Jeffrey R. Cohen and Stanley D. Heisler, of counsel); and the defendant having

appeared by her attorneys, Glabman, Rubenstein & Reingold (Abraham Reingold, of counsel); and the cause having come on for trial before a duly empaneled jury on the 11th day of May, 1987; and the case having been tried on May 12, 13, 14, 18, 19, 20, 21, 22, 26, 27, 28 and 29, 1987, testimony having been given in open court; and the jury after due deliberation, having rendered its unanimous verdict on May 29, 1987 that the conduct of defendant, Monica Getz, did so endanger the physical or mental well being of plaintiff, Stanley Getz, as to render it unsafe or improper for plaintiff to cohabit with defendant; and

Now, therefore it is:

ORDERED AND ADJUDGED that the plaintiff, STANLEY GETZ, be and he hereby is granted judgment of divorce dissolving the marriage of the parties by reason of the cruel and inhuman treatment of the plaintiff by the defendant pursuant to Section 170(1) of the Domestic Relations Law; and it is further

ORDERED that, pending further order of the Court, neither party shall dispose of, transfer, pledge, or encumber the parties' interest in the Shadowbrook property; and it is further

ORDERED that the Court retains jurisdiction to determine all pending matters and issues ancillary to the parties' divorce which shall be heard at the direction of the Court; and it is further

ORDERED that pending further Order of the Court, all *pendente lite* Orders currently in effect are continued.

ENTER

/s/ Nicholas Colabella

Justice of the Supreme Court
Nicholas Colabella
Acting J.S.C.

APPENDIX 2

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
GUY J. MANGANO
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN, JJ.

Motion No. 195

DECISION & ORDER
ON MOTION

Stanley Getz, respondent,
v Monica Getz, appellant.

Motion by appellant to enlarge time to perfect the appeal from a judgment of the Supreme Court, Westchester County, dated October 6, 1987.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that the appellant's time to perfect the appeal is enlarged to the June 1989 term; and the appeal shall be placed on the calendar for said term; and it is further,

ORDERED that the record on appeal and appellant's brief must be served and filed on or before March 31, 1989; and respondent's brief must be served and filed on or before May 1, 1989.

No further extensions of time will be granted on this appeal.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

February 1, 1989

GETZ v. GETZ

APPENDIX 3

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
GUY J. MANGANO
SYBIL HART KOOPER
ARTHUR D. SPATT, JJ.

Motion No. 2667

DECISION & ORDER
ON MOTION

Stanley Getz, respondent,
v Monica Getz, appellant.

Motion by the appellant for an enlargement of time to settle the record on appeal from a judgment of the Supreme Court, Westchester County, dated October 6, 1987, and for other related relief.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, and on the court's own motion, it is further,

ORDERED that the appeal is dismissed without costs.

The appellant sought and received an extension of time to perfect this appeal. The appellant was on notice that "no further extension of time would be granted".

MOLLEN, P.J., MANGANO, KOOPER and SPATT, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

May 11, 1989

GETZ v. GETZ

APPENDIX 4

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
GUY J. MANGANO
SYBIL HART KOOPER
ARTHUR D. SPATT, JJ.

Motion No. 4670

DECISION & ORDER
ON MOTION

Stanley Getz, respondent,
v Monica Getz, appellant.

Motion by appellant for reargument of the motion to enlarge time to perfect the appeal from a judgment of the Supreme Court, Westchester County, dated October 6, 1987, which was denied by order of this court dated May 11, 1989 and upon the court's own motion, dismissed the appeal.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MOLLEN, P.J., MANGANO, KOOPER and SPATT, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

September 5, 1989

GETZ v. GETZ

APPENDIX 5

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

CHARLES B. LAWRENCE, J.P.
JOSEPH J. KUNZEMAN
ISAAC RUBIN
GERALDINE T. EIBER, JJ.

Motion No. 7624

DECISION & ORDER
ON MOTION

Stanley Getz, respondent,
v Monica Getz, appellant.

Motion by respondent to dismiss the appeal of the defendant from an order of the Supreme Court, Westchester County, entered January 17, 1989, which denied defendant's motion to set aside the jury verdict, which found the defendant had committed acts constituting cruel and inhuman treatment and adultery in this divorce action, on the grounds that (1) this court by order dated May 11, 1989, dismissed defendant's appeal from the judgment of divorce of the same court, dated October 6, 1987, (2) by order dated September 5, 1989, this court denied reargument of the motion to dismiss, and (3) the record on appeal as filed on the appeal from the order does not contained the stenographic transcript of the minminutes of the trial.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted, and the appeal is dismissed, without costs. (See *Bray v. Cox* 38 NY2d 350).

LAWRENCE, J.P., KUNZEMAN, RUBIN and EIBER, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

October 5, 1989

GETZ v. GETZ

APPENDIX 6

At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Westchester, at the Courthouse, 111 Grove Street, White Plains, New York, on the 8th day of March, 1989

P R E S E N T :

Hon. Nicholas Colabella,
Justice

-----X		
STANLEY GETZ,	:	
	:	
Plaintiff,	:	JUDGMENT
	:	
-- against --	:	
	:	Index No.
	:	13940/81
MONICA GETZ,	:	
	:	
Defendant.	:	
-----X		

The plaintiff having brought this action for a judgment of divorce upon the grounds of cruel and inhuman treatment and adultery and for ancillary relief, and a jury verdict having been rendered on May 29, 1987, in favor of plaintiff upon both grounds of cruel and inhuman treatment and adultery; and judgment of divorce having been entered in favor of plaintiff, on October 6, 1987 upon the ground of defendant's cruel and inhuman treatment of plaintiff; and the Court having retained jurisdiction to determine the ancillary financial issues of equitable distribution, maintenance, arrears and counsel fees; and the ancillary matters having come on for trial before me, and the parties having appeared before me and presented their written and oral proof and the Court having made and filed its decision dated February 9, 1989;

NOW, on motion of COHEN and SHALLECK, attorneys for the plaintiff, it is

ORDERED AND ADJUDGED that the marital property shall be distributed as follows:

(a) From the gross sales price of the property known as Shadowbrook, in Irvington, New York (directed to be sold by order of this Court dated September 6, 1988) the parties shall pay

(i) the closing costs;

(ii) real estate taxes;

(iii) town and village charges;

(iv) the joint mortgage to First National City Bank dated August 1, 1966;

(v) the joint mortgage dated September 19, 1983 and judgment against defendant docketed June 9, 1982, to Chemical Bank;

(vi) the federal tax liens against plaintiff for 1980; and

(vii) the judgments docketed August 3, 1983 and August 10, 1984 against plaintiff and defendant to the New York State Tax Commission.

The net proceeds shall be divided equally between the parties. The remaining mortgage, lis pendens, judgments and liens shall be discharged or satisfied from the parties' net shares by the party incurring same except that responsibility for the judgment to ZOLT and LOOMIS, docketed September 16, 1987, shall be apportioned 75 % to plaintiff and 25 % to defendant.

(b) The 5,000 square meters of real property in Spain shall be placed on the market for sale within 45 days of the entry of this judgment. If the parties cannot agree on a sales price, the parties shall designate an appraiser to determine the sale price within thirty (30) days of the date of this judgment. If the parties cannot agree, an appraiser appointed by the Court shall set the sale price. At the closing, the parties shall pay, from the gross proceeds, (i) the closing costs, (ii) real estate taxes and (iii) municipal charges. The parties shall thereafter equally divide the net proceeds.

(c) All royalties for recordings made by plaintiff after November 8, 1956, and before February, 1981, shall be equally divided between the parties and disbursed directly to each party when paid; and it is further

ORDERED and ADJUDGED that, pending the sale of the Shadowbrook property, defendant shall continue to collect and apply the rents received as provided in the parties' February 11, 1982 so-ordered agreement; and it is further

ORDERED and ADJUDGED that, except as provided herein, all *pendente lite* orders, including the order of Hon. Matthew Coppola dated March 19, 1987 and filed on March 20, 1987, shall terminate upon entry of this judgment; and it is further

ORDERED and ADJUDGED that all royalties due from recordings made by plaintiff prior to the marriage and subsequent to the commencement of this action constitute the separate property of the plaintiff; and it is further

ORDERED and ADJUDGED that since defendant's request for maintenance has been withdrawn based upon plaintiff's deteriorating medical condition as presented by the testimony of plaintiff's physician and the Mayo Clinic medical records, the defendant is hereby granted leave to reopen this request upon a showing that the portrayal of plaintiff's condition has been materially inaccurate; and it is further

ORDERED that defendant, at her sole expense, may conduct a physical examination of plaintiff in California by a physician of her choice within 60 days of the entry of this judgment; and it is further

ORDERED and ADJUDGED that defendant's request for a judgment of arrears in temporary support allegedly due pursuant to the February 11, 1982 so-ordered agreement, be and the same is hereby denied; and it is further

ORDERED and ADJUDGED that defendant's request for counsel fees, costs and disbursements be and the same is hereby denied; and it is further

ORDERED and ADJUDGED that defendant's recrimination defense to plaintiff's second cause of action for adultery be and the same is hereby dismissed and plaintiff is granted leave to resettle the judgment of divorce rendered by this Court on October 6, 1987 so as to include the ground of adultery as an additional ground for the judgment heretofore rendered; and it is further

ORDERED and ADJUDGED that plaintiff's third cause of action for specific performance of the February 11, 1982 agreement be and the same is hereby dismissed as academic, based upon the order of this Court dated September 8, 1988, which order directed the sale of the Shadowbrook property.

E N T E R

/s/ Hon. Nicholas Colabella

Justice of the Supreme Court
Hon. Nicholas Colabella
Supreme Court Justice

